2002

# The State of Utah v. Joshua Earl : Brief of Appellant

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| JOSHUA EARL, | : | Case No. 20020821-CA |
| Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

Appeal from a judgment of conviction for Possession of Clandestine Laboratory Precursors and/or Equipment, a second degree felony, in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b) (2001), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sheila McCleve, Judge, presiding.

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## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for one count of possession of clandestine laboratory precursors and/or equipment, a second degree felony, in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b), in the Third Judicial District Court, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a–3(2)(e) (2002). See Addendum A (Judgment and Conviction).

## STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

ISSUE: Did the trial court err in denying Appellant's motion to suppress evidence seized after an illegal warrantless entry of his house in violation of the Fourth Amendment?

Standard of Review: "We review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard. However, we review the trial court's conclusions of law based on these findings 'for correctness, with a measure of discretion given to the trial judge's application of the

legal standard to the facts.'" State v. Kohl, 2000 UT 35, ¶9, 999 P.2d 7 (quotation and citation omitted).

## PRESERVATION OF THE ARGUMENT

Appellant Joshua John Earl's challenge to the constitutionality of the search and seizure is preserved on the record for appeal ("R.") at 33-39 and 56-67.

## CONSTITUTIONAL PROVISION

The United States Constitution, Fourth Amendment, is determinative of the issue on appeal. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### Nature of the Case, Course of the Proceedings, and Disposition in the Court Below.

Earl was charged by Information with one count of possession of clandestine laboratory precursors and/or equipment, a first degree felony, in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b) (1953 as amended); one count of purchase, transfer, possession or use of a dangerous weapon by a restricted person, a third degree felony, in violation of Utah Code Ann. § 76-10-503(2)(b) (1953 as amended); and unlawful possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1953 as amended). R.4-7. An arrest warrant issued. R.1.

Earl moved to suppress evidence that was seized during a search of a house in which he was temporarily residing. R.53-54. He filed two written motions. R.33-39,56-66. The State filed one written motion. R.40-51. An evidentiary hearing on the motion was held. R.278. The trial court denied Earl's motion. R.73-74. It provided written findings and conclusions of law in its order. R.127-33 (Addendum B).

Earl entered a conditional guilty plea pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988). R.233. The State amended the Information to one count of possession of clandestine laboratory precursors and/or equipment, a second degree felony, in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b); the remaining counts were dismissed along with a sentencing enhancement. Id.; R.4-7. Earl pled guilty to that single charge. R.233. Earl was duly sentenced to prison. R.260-61. A timely notice of appeal was filed. R.262-63.

## STATEMENT OF THE FACTS

The following evidence was testified to at a suppression hearing:

Sheila Gledhill ("Gledhill") rented a house she owned, located at 34 West 2700 South, to her son Jeremy Allen ("Allen"). R.278[8]. Allen agreed to pay $350 rent per month. R.278[9]. In lieu of rent, Allen was supposed to maintain the yard and keep the inside of the house clean. R.278[9-10]. Allen was behind on the rent and had failed to keep up the house properly. R.278[9]. Consequently, Gledhill decided to evict her son. R.278[8].

Gledhill testified that a clerk at a nearby convenience store informed her that a skinhead named Marvin was living with Allen at the house. R.278[10,23]. Gledhill also heard a rumor that Marvin was running a meth lab there. R.278[11]. Gledhill had not given permission for a second person to live in the house. R.278[10].

Gledhill called the police from her cell phone from a business next door to the house. R.278[11]. She wanted the police to accompany her to the house because she was fearful of the possible second tenant. R.278[10].

Officer Dean Brimley ("Brimley") of the South Salt Lake Police Department responded. R.278[11,26]. Gledhill walked with Brimley to the front door and unlocked it with her own key. R.278[13]. Gledhill testified that she did not give Brimley consent to search the house. R.278[21].

Brimley testified that he accompanied Gledhill to the residence to keep the peace while she evicted Allen. R.278[26]. Brimley was uniformed and armed, although his weapons (gun, baton, and spray) were not drawn. R.278[28]. Gledhill told him that Allen had a drug problem with methamphetamine and marijuana. R.278[26]. She also reported the rumors of a meth lab at the house. Id. However, Brimley did not independently investigate Gledhill's claims prior to entering the house. R.278[38].

After Gledhill opened the front door with her key, she and Brimley went inside. R.278[14,27]. The front door led immediately into the living room. R.278[14]. Brimley and Gledhill saw four men in the kitchen area. R.278[27]. Allen and Earl sat in the

kitchen in front of a computer. R.278[14]. A man Gledhill did not recognize was also at the computer. Id. Brimley did not recognize any of the men. R.278[29]. The men were behaving in an orderly, non-threatening manner. R.278[41].

Earl testified that he was living with Allen temporarily since he was kicked out of his aunt's house. R.278[58]. He kept his clothes at the house and helped out with the chores and groceries. R.278[61]. Allen and Earl are stepbrothers and friends. R.278[19,58]. According to Gledhill, Earl did not have permission to be at the house. R.278[18]. Earl did not inform the officers that he lived there, and none of the officers asked. R278[59].

Brimley observed items that he associated with meth labs and paraphernalia, including bottles which were later confirmed to hold iodine, several little bottles lined up in a row by a couch, many boxes of pseudoephedrine by the couch, and a bong-type instrument on the coffee table. R.278[29]. Gledhill testified that she observed a glass pipe on the coffee table. R.278[14].

Brimley ordered the men into the living room to get them away from sharp objects. R.278[31]. Brimley did not get a search warrant. R.278[39]. He decided to frisk the men on account of his safety concerns since he was outnumbered, he could not see their hands when they were in the kitchen, he observed the drug paraphernalia, and had information from Gledhill about a possible criminal activity. R.278[30-31,39]. Brimley noted that the men did not display any threatening actions. R.278[41].

Brimley asked for everyone's identification. R.278[30]. All of the men except Earl produced i.d.. Id. Earl said he did not have any i.d., but provided the name Justin Ganon. Id. Brimley also asked each man if he had weapons. R.278[32]. Earl replied that he did, and he, along with the others, was frisked. Id. Earl did not consent to the frisk. R.278[40]. He did not object, however, since he felt that he had no choice in the matter. R.278[59]. Brimley held Earl's hands behind him while he conducted the frisk. R.278[32]. Brimley located a sheathed knife concealed in Earl's pants under his shirt. Id. He also found a four-inch pocket knife in Earl's pocket. R.32. He then located Earl's wallet. R.278[33]. Earl let him retrieve it. Id. Without permission from Earl, Brimley looked inside the wallet and found Earl's identification. R.278[33,44].

Brimley cuffed Earl and placed him under arrest for the concealed weapon and providing false information. R.278[33]. He told Earl to sit on the couch. Id. Allen signed a consent form allowing the officers to search the house. R.278[35]. The consent was limited to property that was under his control. R.278[42]. Brimley testified that Gledhill gave verbal consent as well. Id. However, he acknowledged that Gledhill did not live at the house so the only consent could come from Allen since he actually resided there. R.278[43].

Brimley searched a backpack belonging to Earl that was sitting on the floor next to the couch. R.278[36]. According to Brimley, Allen told Brimley the backpack belonged to Earl after it was searched. Id. Brimley also testified that court documents in

the backpack were subsequently linked to Earl. Id. The backpack contained two iodine bottles identical to the bottles observed on the floor, scales. a how-to book on methamphetamine, and red phosphorous. R.278[36,49].

## SUMMARY OF THE ARGUMENT

The trial court erred in failing to suppress evidence seized in violation of Earl's Fourth Amendment right against warrantless search and seizure. See U.S. CONST. amend. IV; UT. CONST. art. I, § 14. Earl has standing to challenge the search since he was a temporary resident of the rental house at the time of the search. See Minnesota v. Olson, 495 U.S. 91 (1990); State v. Kent, 432 P.2d 64 (Utah 1967).

Although the officer was granted consent to enter the house by the landlord, State and Federal law hold that landlords do not have actual authority to grant consent to search. See Chapman v. United States, 365 U.S. 610 (1961); Kent, 432 P.2d 64. Moreover, the officer did not have a reasonable belief in the landlord's apparent authority to consent since he knew she did not live at the house. See Illinois v. Rodriguez, 497 U.S. 177 (1990); State v. Elder, 815 P.2d 1341 (Utah Ct. App. 1991).

The illegal entry renders all evidence subsequently seized inadmissible. See Wong Sun v. United States, 371 U.S. 471 (1963). The evidence seized in plain view is inadmissible since the initial entry was unlawful. See State v. Gallegos, 967 P.2d 973 (Utah Ct. App. 1998). Moreover, the illegal entry taints the consent subsequently given by Earl's roommate, Allen. See United States v. Maez, 872 F.2d 1444 (10th Cir. 1989);

State v. Thurman, 846 P.2d 1256 (Utah 1993). In any event, Allen's consent does not authorize the search of Earl's backpack since it was expressly limited to Allen's belongings alone, and the officer did not have a reasonable belief otherwise and did not make a further inquiry to discern the pack's owner as required by the Fourth Amendment. See United States v. Matlock, 415 U.S. 164 (1974); Rodriguez, 497 U.S. 177.

The illegal entry further taints the search incident to Earl's arrest for presenting false identification. The illegal entry factor differentiates this case from standard searches incident to lawful arrest where there is no prior illegal police misconduct. See Chimel v. California, 395 U.S. 752 (1969). Given this added concern under the Fourth Amendment, a more rigorous analysis of the reasonableness of the officer's search under the totality of the circumstances is appropriate. See Terry v. Ohio, 392 U.S. 1 (1968). Viewed in light of the totality of the circumstances, the officer exploited the illegal entry to arrest Earl and search the backpack. Moreover, the evidence does not suggest that the officer had a genuine fear that Earl would access a weapon or evidence considering that he did not search the backpack immediately after Earl's arrest.

As a final matter, there were no exigent circumstances that might otherwise justify the search. See Chapman, 365 U.S. 610. In fact, the evidence establishes that the officer had ample opportunity to secure a warrant but failed to do so. Id. Under the circumstances of the case, his failure to do so does not comport with the Fourth Amendment's reasonableness standard. See Terry, 392 U.S.1.

## ARGUMENT

ISSUE: THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment to the U.S. Constitution guarantees the right of individuals to be free from unreasonable searches and seizures except upon the issuance of a warrant by a neutral magistrate. See U.S. CONST. amend. IV; see also UT. CONST. art. I, § 14.

No warrant was obtained before the police entered the house of Allen and his temporary house guest Earl. R.278[30,39]. In certain, limited circumstances, plain view, consent and a search incident to arrest are exceptions to the warrant requirement. However, as discussed herein, none of the exceptions to the Fourth Amendment warrant requirement apply in this case and the evidence seized is inadmissible.

### A. Fourth Amendment Protections Extend to Earl as a Resident of the Rented House.

The trial court made a clearly erroneous factual finding that Earl was not a resident of the house for purposes of standing under the Fourth Amendment. R.129. As discussed below, the undisputed facts of this case establish that he was in fact a resident who stayed at the house. See Minnesota v. Olson, 495 U.S. 91, 96-97 (1990) (holding that overnight guest in house enjoyed Fourth Amendment protections). Yet, even if he was only a social visitor at the house, he would still have standing under the Fourth Amendment to challenge the search and seizure of his belongings at the house. See State

v. Rowe, 806 P.2d 730. 735 (Utah Ct. App. 1991) (rev'd on other grounds, 850 P.2d 427 (Utah 1992)).

The Utah Supreme Court has stated that "leased and rented premises [] come under the protection of the Fourth Amendment." State v. Kent, 432 P.2d 64, 66 (Utah 1967) (footnote with citations omitted). The house at issue was rented by Allen from his mother, Sheila Gledhill. R.278[8]. Gledhill was the landlord, while Allen was the tenant. According to Gledhill, Allen lived in the house and was responsible for maintaining the yard and the inside. R.278[9]. Allen paid her $350 per month for rent and/or did house and yard work in exchange for the right to live at the house. Id.

Earl was a temporary resident of the house, which means the Fourth Amendment protections extended to him as well. See Olson, 495 U.S. at 96-97 (1990) (holding that overnight guest in house enjoyed Fourth Amendment protections). The test for standing depends upon whether "the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S.128, 143 (1978). "A subjective expectation of privacy is legitimate if it is 'one that society is prepared to recognize as 'reasonable.'" Olson, 495 at 95-96 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

In light of these guidelines, the U.S. Supreme Court in Olson held that an overnight guest in a house enjoys Fourth Amendment protections. Id. at 96-97. The Court reasoned that society values the custom of allowing a guest to stay in one's home.

Id. at 98. The Court also noted the particular vulnerability of the overnight guest, who is removed from his own house and must temporarily rely on the protection and security of another's. Id. at 99. Recognizing that the Fourth Amendment "'protects people, not places,'" id. at 96 n.5 (quoting Katz, 389 U.S. at 351), the Court concluded that an overnight guest has legitimate expectations of privacy in his or her host's home "not inconsistent with" the host's "ultimate control of the house." Id. at 99

This Court similarly recognized the Fourth Amendment rights of house guests of virtually any duration in State v. Rowe, 806 P.2d 730 (Utah Ct. App. 1991), rev'd on other grounds, 850 P.2d 427 (Utah 1992) (holding that failure of affidavit to list grounds for requesting nighttime search authority did not implicate defendant's fundamental rights so as to require suppression). This Court noted that there is "no talismanic significance, in determining standing, to the length of time a social guest is in the home." Id. at 735 (citing Olson, 495 U.S. 91). Hence, although the defendant was not an overnight guest, she had standing to challenge the search of her purse. Id.

Earl had a greater status as a temporary resident of the house than an overnight guest or social visitor, and consequently enjoys even greater protections under the Fourth Amendment than the defendants in Olson and Rowe. Earl testified that he was Allen's step-brother, living with Allen because he was kicked out of his aunt's house and until he found a place of his own. R.278[58]. He kept his clothes in a closet in the house and helped clean and bought groceries to contribute to the household. R.278[61]. The State

did not present any evidence to the contrary. See generally R.278.

To this extent, the house was Earl's "dwelling place" and his "place of retreat and security" at the time of the entry and search. Kent, 432 P.2d at 69 (footnote and citation omitted). It is the exact sort of protected living arrangement, albeit temporary, that falls under the sweep of the ruling in Olson, which recognized legitimate privacy rights when one stays at another's house while "in between . . . homes" or during a visit with a relative. See 495 U.S. at 98. Yet, under Rowe, even if Earl was only visiting Allen at the house, he would still have a legitimate expectation of privacy recognized by society as valid for purposes of the Fourth Amendment. See 806 P.2d at 735. Consequently, Earl has standing to challenge the constitutionality of the search and seizure of his belongings which occurred at the house while he was there. Olson, 495 U.S. at 96 (quotation omitted); see also Rowe, 806 P.2d at 735.

Although the findings do not suggest otherwise, Earl had standing to challenge the search of his backpack inside the house even if he was not residing or staying there. The uncontroverted evidence presented at the suppression hearing establishes that the backpack belonged to Earl alone, and no-one else had access to it or authority to use it. See generally 278. "A defendant 'who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy.'" State v. Cayer, 814 P.2d 604, 610 (Utah Ct. App. 1991) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)). Since Earl owned the backpack, he has standing to challenge its search as well.

See State v. Harrison, 805 P.2d 769, 783 (Utah Ct. App. 1991) (defendant had standing to challenge search of diaper bag to which he had access).

B. Gledhill Did Not Have Actual or Apparent Authority to Consent to the Entry and Search of the House.

The trial court made a clearly erroneous factual finding that Gledhill consented to a search of the house. R.129. Her own testimony directly refutes that finding. Although Gledhill asked the police to accompany her into the house to protect her, R.278[13], she expressly testified that she did not consent to the search. R.278[21].[1] Regardless, Gledhill did not have the authority, actual or apparent, to consent to either an entry or search of the house.

i. Gledhill, as a Landlord, Did Not Have Actual Authority to Consent and Otherwise Lacked Common Authority over the House for Most Purposes to Provide Valid Consent.

The trial court made an incorrect legal finding that Gledhill could consent to entry of the house since she had a "right to enter the property to inspect it." R.130. Contrary to the trial court's order, Gledhill did not have the authority as a landlord to give consent

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[1] The colloquy at the hearing is as follows:

> Defense Counsel: Of course, you asked the officers to accompany you to the house. Ms. Gledhill, did you ever give the officers permission to search the house?
>
> Gledhill: No, I did not.

R.278[21].

to enter or search the house. R.130.

The U.S. Supreme Court and the Utah Supreme Court have expressly rejected the proposition that a landlord has actual authority to consent based on her property rights. See Chapman v. United States, 365 U.S. 610, 618 (1961) (search of a tenant's premises pursuant to a landlord's consent was illegal under the Fourth Amendment); Stoner v. California, 376 U.S. 483, 490 (1964) (hotel front desk clerk could not give valid consent to search the room rented by the defendant); State v. Kent, 432 P.2d 64, 65, 68-69 (Utah 1967) (motel manager could not consent to police use of "a hidden vantage point from which [the police] could keep Kent under surveillance").

Chapman, Stoner and Kent all have at their core the principle that is critical to an analysis of this issue: tenants possess a right to be secure in their places of privacy and seclusion which exists notwithstanding a landlord's property interest. Authority to consent is "not to be implied from the mere property interest a third party has in the property." United States v. Matlock, 415 U.S. 164, 172 n.7 (1974). The privacy right is a function of a person's right of occupancy in a place and "control [over the property] for most purposes," not common law property interests. Id. "'It is the right of possession rather than the right of ownership which ordinarily determines who may consent to a police search of a particular place.'" State v. Brown, 853 P.2d 851, 855 (Utah 1992) (quoting 3 Wayne R. LaFave, Search and Seizure § 8.5(b) (2d ed. 1987)).

In Chapman, the landlord walked up to the tenant's house to invite him to church.

See 365 U.S. at 611. He noted an "'odor of mash' about the house" and called the police. Id. The landlord told the officers to go in a window to see what was going on. Id. at 612. The officers did so and observed a "sizable distillery and 1,300 gallons of mash." Id. Chapman arrived at the house shortly thereafter and was arrested. Id. The officers had neither an arrest nor a search warrant. Id.

In holding the search unconstitutional, the Supreme Court rejected common law principles that allow landlords to enter rented premises to do such things as "'view waste,'" noting that "'it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law.'" Id. at 617 (quotation omitted). "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the (Fourth) Amendment to a nullity and leave (tenants') homes secure only in the discretion of (landlords).'" Id. (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). The Court also reasoned that the police did not enter Chapman's house to view waste, but to investigate a suspected illegal distillery, which took the search out of the legitimate scope of landlord access even if it were to provide a justifiable basis for the entry and search. Id. at 616.[2]

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[2] The Chapman Court also relied on the fact that the police had an opportunity to get a search warrant prior to entering the house in ruling that the search was unreasonable. See 365 U.S. at 614. The relevance of that aspect of the Chapman holding to the present case is discussed infra point I.C.iv..

In Stoner, the police followed a lead on a burglary investigation to a hotel where the defendant was staying. See 376 U.S. at 484. The defendant was not in his room, so the police asked the desk clerk if they could go into the room to make an arrest. Id. at 485. The clerk agreed and opened the room with a key. Id. The officers located evidence linking defendant to the burglary and arrested him two days later. Id. at 486. The police did not have a search or arrest warrant. Id.

In holding the search illegal, the Stoner Court reasoned that California, where the search occurred, did not have any law giving a "hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests." Id. at 488. Moreover, the police did not have a reasonable belief that the hotel had authority to consent to the search in this case. Id. "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" Id. Finally, the Court acknowledged that a hotel proprietor may retain a right of access for certain activities, such as maid service and maintenance. Id. at 489. However, entry for the purposes of search and arrest were of "an entirely different order" and implicated the tenant's Fourth Amendment privacy interests. Id. (citing Chapman, 365 U.S. at 616).

In Kent, the police had information that defendant and his wife were linked to burglaries. See 432 P.2d at 65. The couple were staying at a motel. Id. The police obtained consent from the hotel manager to covertly view the defendant through an air

vent in the ceiling of the room. Id. They overheard the wife making incriminating statements to defendant, and observed defendant preparing to consume drugs. Id.

In ruling the search improper, the Utah Supreme Court noted at the outset that "it is the degree of privacy which the defendant enjoyed in the [hotel room] that is the important factor in determining the reasonableness of the search," rejecting claims that the proprietor's property interest in the room validated the consent. Id. at 66. Although a landlord has an interest in cooperating with police to assist in investigating crime and protect his property, it does not "constitute an ersatz in place of a warrant." Id. at 67.

The Kent Court took care to explain the underlying privacy interests of tenants, be they of a hotel room or an apartment. "[T]he right of privacy gives added emphasis to the dignity of man" and is "protected and guaranteed against unwarranted intrusions." Id. at 68. "Privacy means a state apart from company or observation; it means a place of seclusion and secrecy." Id. at 69. "The defendant had the right to maintain his place of abode, though it was a room in a motel . . . free from outside intrusion and observation." Id. When a person is unjustifiably observed, even "under unfavorable circumstances," the "gravamen of the harm is the injury to privacy." Id. (footnote omitted).

The foregoing compels the conclusion that Gledhill's proprietary interest in the rented house does not validate her consent to enter or search it. First, Allen and Earl, not Gledhill, exclusively occupied the rented house. R.278[8,58]. It was their home, not hers. Allen rented it from her. R.278[8]. They had "control for most purposes" over the

house, including the yard and house work, and invitation of guests of their own choosing. R.278[9-10]. Gledhill did not have any of these rights at the house and therefore lacked common authority validating her consent. Cf. Matlock, 415 U.S. at 169-171 (cohabitant in house could consent to search of areas she shared with defendant).

The State did not offer any evidence suggesting that Gledhill retained any other right of common authority over the house, or any similar right of entry for other purposes, such as storage or parking to give her actual authority to consent. See State v. Elder, 815 P.2d 1341, 1344 (Utah Ct. App. 1991) (consenting party lacked common authority to consent to search of defendant's house although defendant gave consentor the key so she could retrieve some clothing for defendant); State v. Davis, 965 P.2d 525, 534 (Utah Ct. App. 1998) (defendant's roommate, a probationer, did not have common authority over defendant's car to consent to its search); Commonwealth v. Latshaw, 392 A.2d 1301 (Pa. 1978) (landlord could consent to search of barn on property that she rented to defendant since agreement did not include barn and she retained access to it).

The fact that Gledhill was there to evict Allen does not validate her consent to enter or search. R.278[8]. As a matter of due process, Allen was entitled to certain statutory measures before eviction could occur. See Utah Code Ann. § 78-36-12 (2002) ("[i]t is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process"). The required process includes service of notice. See Utah Code Ann. §78-36-6 (describing requirements for service of eviction notices);

Utah Code Ann. § 78-36-3 (describing types of eviction notices, including three-day pay-or-quit, three-day nuisance, three-day comply or quit, five-day tenant-at-will, and fifteen-day no-cause). Even eviction for "nuisance" such as where a drug house is suspected requires a hearing and court order prior to eviction. See Utah Code Ann. §§ 78-38-9, -10, -11. Gledhill testified that she did not follow any of these statutory notice requirements prior to going to the house with the police to evict Allen. R.278[20]. Consequently, she was not legally on the premises within that context either.

In any event, Gledhill's overarching purpose in going to the house and bringing the police with her was based on her suspicion and personal fear that a skinhead was living in the house with Allen and operating a meth lab out of there. R.278[10-11]. Fourth Amendment protections are implicated where the primary purpose of a landlord's consent to enter and search is to investigate suspected crime. See Chapman, 365 U.S. at 616 (landlord's consent invalid where given to search for illegal distillery rather than to "'view waste'" on the rented premises) (quotation omitted); Stoner, 376 U.S. at 489 (although hotel proprietor may enter room to conduct maidservice and maintenance, entry for purposes of investigating crime violated Fourth Amendment). Although Gledhill, as a landlord, "has a duty, as well as a vital interest in cooperating with officers so as to remove [her]self of suspicion and the right to promptly exculpate [her]self by allowing a search, . . . [her] permission . . . will not constitute an ersatz in place of a warrant." Kent, 432 P.2d at 66-67. If anything, the officers' knowledge that they were at

the house where a possible meth lab was present obliged them to seek a warrant before entering and renders their decision to make a warrantless entry unreasonable. In fact, as discussed infra Point I C iv., the officers had ample opportunity to secure a warrant before entering the house.

ii. Officer Brimley Did Not Have a Reasonable Belief in Gledhill's Apparent Authority to Search the House to Validate Her Consent.

The trial court in the present case made a clearly erroneous finding that Officer Brimley, who accompanied Gledhill, R.278[26], was "justified in believing" she had "authority to grant consent," and that he took "reasonable steps to ensure that his entry was lawful by interviewing Ms. Gledhill . . . to ascertain her ownership, relationship to the property and the occupants." R.130. In fact, Officer Brimley testified at the suppression hearing that he got written consent from Allen, although he already had verbal consent from Gledhill, since "he was in control of the house at the time." R.278[43]. Hence, the trial court's finding is directly controverted by the State's own evidence as well as unsupportable in the law as discussed below.

Contrary to the court's finding, Gledhill did not have apparent authority to consent to the entry or search. See Illinois v. Rodriguez, 497 U.S. 177, 188 (1990). The U.S. Supreme Court in Rodriguez held that a third party may give valid consent to enter although she lacks actual authority to do so if the police have a reasonable, albeit mistaken, belief that she has common authority over the premises. Id. However, if the officers' understanding is not reasonable, it is incumbent upon them to inquire further or

get a warrant. Id. Absent either precautionary measure, the consent is invalid. Id.

A review of State v. Elder, 815 P.2d 1341 (Utah Ct. App. 1991), is instructive regarding apparent authority. There, this Court held that police officers did not have a reasonable belief in a third party's apparent authority to consent under a similar set of facts. Id. at 1344-45. As in the present case, there was a familial relationship between the consentor and the defendant, who were brother and sister. Id. at 1342. The defendant lived with their mother in the mother's house. Id. He paid rent and had a bedroom there plus shared access to the rest of the house. Id. While defendant was on a camping trip, the mother was hospitalized and gave the daughter her key and asked her to get her some clothes from the house. Id. She also informed the daughter that the defendant might be growing marijuana in the crawlspace of the house. Id. The daughter went to the house with her husband, who kicked open a locked door to the crawlspace where she found marijuana plants. Id. She called the police and let them in the house. Id. She told them she did not live there and that her hospitalized mother gave her the key to get some clothes. Id. She also told the officers that her brother was a tenant and was not present at the time, and that her husband kicked in the crawlspace door to enter. Id.

Based on these facts, the court held the search was unreasonable. Id. at 1344-45. "As a matter of law, such facts conclusively dispel whatever indicia of authority might have arisen from the [familial] relationship, the delivery of keys to other parts of the home, and a mother's expression of concern about marijuana being grown in the

crawlspace by her son." Id.

As in Rowe, the facts of the present case should have "dispel[led]" any notion of Brimley's that Gledhill had apparent authority to consent to the search of the rented house. Id. at 1344. First, Brimley himself testified that Allen "was in control of the house at the time." R.278[43]. He further testified that he got consent to search the house from Allen on account of his understanding. Id.

"[T]he [additional] surrounding circumstances . . . [are] such that a reasonable person would doubt [that Gledhill had apparent authority] and not act upon it without further inquiry." Rodriguez, 497 U.S. at 188. Brimley knew that Gledhill was the landlord of the house, not the tenant. R.278[43]. Although she had a key to the place, she did not live there. R.278[8,13]. Brimley was aware that the tenants were not evicted as of yet since Gledhill asked him to accompany her to help her do that. R.278[26]. Moreover, he knew that the tenants were present at the house since Gledhill asked him to accompany her there in anticipation of meeting them. Id. Indeed, the facts of the present case are even less conclusive as to apparent authority since the consentor in Rowe actually had permission to enter the house, whereas Gledhill did not and, instead, showed up uninvited and unannounced to evict Allen at 8:00 a.m. for the purpose of detecting a suspected meth lab. R.278[26].

Under these circumstances, a person of "reasonable caution" would inquire whether Gledhill had any claim to the property beyond mere ownership that would justify

a warrantless entry. Id. (citation omitted). However, the record is totally silent as to any attempt made by Brimley to further inquire into Gledhill's authority to consent. See generally R.278. The fact that he got consent from Allen after the fact evinces that Brimley was aware that Gledhill's consent was not valid.

In addition to having an unreasonable belief in Gledhill's apparent authority, Brimley had ample opportunity to seek valid consent from the occupants themselves prior to entering or, alternatively, seek a warrant based on the information that Gledhill provided. See infra Point I C iv (discussing officers' opportunity to obtain warrant and lack of exigent circumstances). He knew the occupants were present in the house before he entered since Gledhill told him so. R.278[26]. He also knew of the suspected meth lab. Id. However, Brimley did not take any of these reasonable opportunities to honor the Fourth Amendment rights of the occupants inside, instead relying on the unreasonable belief that Gledhill's consent was valid.

Hence, the trial court made an incorrect legal conclusion that Brimley "took reasonable steps to ensure that his entry with the owner was lawful." R.130. In truth, Gledhill lacked apparent authority which might otherwise validate her consent. See Rodriguez, 497 U.S. at 188 (apparent authority to consent does not exist where "reasonable person would doubt" its existence); Elder, 815 P.2d at 1344-45 (third-party consent invalid where unsupported by officers' reasonable belief).

C. The Illegal Entry Based on Gledhill's Invalid Consent Renders All Evidence Subsequently Seized Inadmissible Fruit of the Poisonous Tree

and Taints Any Other Possible Justifications for the Warrantless Search and Seizure.

Since Gledhill had neither actual nor apparent authority to consent to an entry or search of the house, the entry and search was illegal and all evidence subsequently seized is inadmissible. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also Florida v. Royer, 460 U.S. 491, 507-08 (1983) (extending exclusionary rule to illegal searches based on invalidated consent). "The exclusionary rule prohibition extends as well to the indirect as the direct products of" the illegal and warrantless entry into Allen and Earl's house. Wong Sun, 371 U.S. at 484. Hence, this Court need go no further in its analysis in deciding that the trial court erroneously denied the suppression motion and in reversing Earl's conviction.

i. Evidence Seized in Plain View Is Inadmissible Since Officer Brimley Was Not Lawfully Present.

In this case, Brimley testified that he walked in the front door of the house and observed in plain view what he considered "drug paraphernalia," including "iodine bottles," which were later confirmed to be iodine, "little bottles in a row next to a couch," "many boxes of pseudoephedrine that were stacked next to the couch," and a "bong-type smoking instrument on the coffee table in the living room." R.278[29].[3]

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[3] The evidence list presented at the suppression hearing indicates that all the evidence was located in Earl's backpack. R.70. Officer Scott Daniels admitted at the hearing that the evidence list was incorrect and that the location of the items is consistent with Brimley's testimony. R.278[51-52].

Evidence seized in plain view is an exception to the warrant requirement of the Fourth Amendment. See State v. Gallegos, 967 P.2d 973, 976 (Utah Ct. App. 1998) (citing State v. Holmes, 774 P.2d 506, 510 (Utah Ct. App. 1989)). However, to establish the plain view exception, the State must show that Brimley was "'lawfully present'" in the house. Id. (quoting State v. Romero, 660 P.2d 715, 718 (Utah 1983)). The evidence must also be in "'plain view'" and "'clearly incriminating.'" Id. (quoting Romero, 660 P.2d at 718).

Brimley's observation of this evidence[4] does not fall within the plain view exception because, as noted supra Point I.B., he was not lawfully present in the house. Gledhill did not have the actual or apparent authority to consent to the entry which allowed him access to the area where he observed the items. This is a marked contrast to other cases concerning items observed in plain view where the officers were lawfully present. See Romero, 660 P.2d at 718 (police were at defendant's residence pursuant to a valid search warrant and limited their search to the geographical areas delineated therein); State v. O'Brien, 959 P.2d 647, 650 (Utah Ct. App. 1998) (state trooper viewed open container during lawful traffic stop); State v. Nield, 804 P.2d 537, 539 (Utah Ct. App. 1990) (officer observed contraband during lawful search warrant of defendant's house).

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[4] Earl does not contend on appeal that the evidence was not in plain view or that it was not clearly incriminating. See Gallegos, 967 P.2d at 976.

ii. Allen's Written Consent Is Involuntary and Tainted Given the Prior Illegal Entry. In Any Event, it Does Not Justify the Search of Earl's Backpack since it Was Limited to a Search of His Own Property and the Officers Did Not Have a Reasonable Belief That Earl's Backpack Belonged to Allen or That Allen Had Common Authority over it.

a. Allen's Consent Was Involuntary and Tainted by the Illegal Entry.

Allen's subsequent written consent to search the house is involuntary in light of the totality of the circumstances surrounding the illegal entry. Moreover, it is insufficiently attenuated from the illegal entry to purge the taint and, consequently, was impermissibly obtained by exploitation of the prior police misconduct. See State v. Thurman, 846 P.2d 1256, 1265 (Utah 1993) (citation omitted). "'Evidence obtained in searches following police illegality must meet both tests to be admissible.'" Thurman, 846 P.2d at 1265 (quotation omitted).

Although this analysis most often arises in situations where the defendant himself consents to a search, it applies with equal force in the present context involving third-party consent. In United States v. Maez, 872 F.2d 1444 (10th Cir. 1989), the Tenth Circuit Court of Appeals applied the analysis to a consent given by defendant's wife, Mrs. Maez, immediately after the defendant was illegally arrested at their home. Id. at 1453-56; see also United States v. McCoy, 839 F.Supp. 1442, 1447 (D. Or. 1993) (applying voluntariness/exploitation analysis to third party consent in holding it tainted). The Court cited to United States v. Ceccolini, 435 U.S. 268 (1978) and Wong Sun, 371 U.S. 471, in rejecting the government's claim that Mrs. Maez's consent could not be

tainted because she was not the one illegally arrested. Id. at 1453.

The Maez Court framed the issue as "whether 'granting establishment of the primary illegality, the evidence to which instant objections is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. (quoting Wong Sun, 371 U.S. at 488). The Court stated that Ceccolini "mandated" that the analysis be applied in the context of third party consents. Id. "While the primary issue before the [Ceccolini] Court was whether a categorical distinction should be drawn between physical and verbal evidence found as the result of an unlawful search, the Court specifically noted that the witness whose testimony was at issue was not a defendant." Id. at 1453 (citing Ceccolini, 435 U.S. at 275, 277). "Thus, the defendant could raise the taint issue as to the statements made by his employee. And while the witness in Ceccolini gave statements, as opposed to a consent to search, the same analysis is required here." Id. at 1454.

In light of the foregoing, the voluntariness/exploitation analysis of Thurman applies to the instant case involving the third party consent of Allen. Allen signed a written consent form permitting the officers to search his house. R.69 (Signed Written Consent Form - Addendum C). The pre-formulated consent form contains a provision which states, "I give permission [for the search] voluntarily without any threat, coercion, or unlawful influence of any kind having been made to induce me to give my consent. I UNDERSTAND THAT I HAVE A CONSTITUTIONAL RIGHT TO REFUSE THE

SEARCH." R.69 (emphasis original). Allen's signature is at the bottom of the form. Id.

The trial court made a legal finding that Allen's consent was "voluntarily granted." R.130. Although Earl does not contest that consent was given, he does challenge the voluntariness of it. "[V]oluntariness is a legal conclusion, which is reviewed for correctness." Hansen, 2002 UT 125, ¶ 51 (citing Thurman, 846 P.2d at 1271).

Voluntariness is analyzed under the totality of the circumstances. Id. at ¶ 56 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226, 248 (1973)) (other citations omitted). The facts of the case must show that "consent was given without duress or coercion." Id. at ¶ 57 (citations omitted). In this case, the atmosphere was pervaded with police authority and an "air of intimidation." Thurman, 846 P.2d at 1272. The police entered the house without knocking at an early hour, 8:00 a.m.. Id. (noting entry without knocking deprives occupants opportunity to maintain control over abode and keep encounter with police "civil").

They came for the purpose of investigating a suspected meth lab and protecting Gledhill against what she supposed would be a hostile eviction encounter. R.278[26]. Hence the police had a mind set that this was not a consensual encounter, but rather an investigation amidst a potentially dangerous situation. In fact, Brimley testified that he had safety concerns upon entering the house and seeing the men in the kitchen since knives were accessible there. R.278[31].

In addition, there were two officers present, Brimley and Loosle. R.278[27].

They were uniformed and armed, although their weapons were not drawn. R.278[28]. They ordered all the men out of the kitchen, and eventually onto the front lawn, for safety purposes. R.278[31,41]. They frisked all the men for safety purposes as well. R.278[40]. They detained the men and asked for their identification. R.278[40]; see State v. Dunn, 850 P.2d 1201, 1219 (Utah 1993) (prosecution bears more burden to establish voluntariness when consentor is in custody). It was in the midst of all this that Brimley asked Allen for his consent, stating, "I had taken everybody out, because of my [safety] concerns, everybody was out on the front lawn, and I asked Mr. Jeremy Allen for consent to search, which he signed a form." R.278[35].

Such an exhibition of police force and authority negated the voluntariness of Allen's consent. See Hansen, 2002 UT 125 at ¶57. In the face of a surprise entry from uniformed officers early in the morning, and in the midst of being ordered out of the kitchen and house, then frisked and detained, Allen's "'capacity for self-determination [was] critically impaired.'" Id. (quoting Schneckloth, 412 U.S. at 225). The fact that the written consent form contained language that it was not obtained through coercion or inducement is of no consequence given the overbearing police presence. R.69. In addition, the words ring hollow considering that they were not penned by Allen, but part of the pre-formulated form presented to him amidst the police flurry. Moreover, the State did not present any evidence that Brimley verbally informed Allen of his right to refuse, or any evidence that Allen actually read through the form and understood his

rights as written. See generally R.278. Consequently, a reasonable person in his position would not have felt free to decline consent despite such language. Indeed, one would have felt that the search was inevitable. Hence, the trial court's legal conclusion that Allen's consent was voluntary is incorrect as a matter of law and unsupportable under the evidence. Hansen, 2002 UT 125 at ¶51 (citation omitted).

Even if the consent was voluntary, it is the product of police exploitation of the illegal entry gained on account of Gledhill's invalid consent to enter. See id. at ¶61. "Whether a person's consent was obtained by police exploitation of a prior [illegal entry] is ultimately a legal conclusion reviewed for correctness." Id. (citing Thurman, 846 P.2d at 1271-72).

"[T]he purpose behind excluding evidence obtained by police exploitation is 'to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.'" Id. at ¶62 (quotations omitted). "When conducting the exploitation analysis, we always keep in mind this deterrence purpose." Id. at ¶63 (citations omitted). "Moreover, we recognize the need for deterrence is strongest where criminal sanctions against the defendant may result." Id.

An exploitation analysis is a fact-sensitive inquiry. Id. at ¶64. Three factors are relevant: "(1) the 'purpose and flagrancy' of the illegal conduct, (2) 'the presence of intervening circumstances,' and (3) the 'temporal proximity' between the illegal detention and consent." Id. (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)). The

"'purpose and flagrancy'" factor is directly related to the "deterrent value of suppression." Thurman, 846 P.2d at 1263 (quotation omitted).

Under these factors, Allen's consent is not sufficiently attenuated from the illegal entry to provide a constitutional basis for the search. See Wong Sun, 371 U.S. at 491 (citations omitted). First, the "'purpose and flagrancy'" of Brimley's illegal conduct is directly related to his request for consent from Allen. State v. Hansen, 2002 UT 125, ¶65-66 (quotation omitted). Brimley testified that he obtained consent to search the house from Gledhill. R.278[43]. He additionally testified, however, that he "also got it from Jeremy Allen, since he was in control of the house at the time." Id. Brimley's testimony establishes that he knew Gledhill could not provide valid consent to enter or search the house. However, he used it to get inside so that he could ask consent of Allen directly. "The incentive present in this case to violate constitutional guarantees by seizing upon an ambiguity and then using that violation to obtain consent to search is precisely the type of incentive that must be removed by excluding evidence obtained thereby." State v. Shoulderblade, 905 P.2d 289, 294 (Utah 1995) (police exploited unconstitutional road block to gain consent to search defendant's car).

In addition, there were no intervening factors that purge the taint of the illegal entry. See Hansen, 2002 UT 125 at ¶68. "Intervening circumstances may include such events as an officer telling a person he or she has the right to refuse consent or to consult with an attorney." Id. (citations omitted). In this case, the pre-formulated consent form

contained a provision that indicated the signor was not induced or coerced into giving consent against his will, as well as a statement in bold letters that he had the right to refuse consent. R.69. As noted in Maez, however, this fact is merely probative of voluntariness, not dispositive. See 872 F.2d at 1456. It can be overridden by other factors at play when a person gives consent. Id.

In fact, Allen's consent was undermined by a variety of circumstances. As discussed above, the language in the form was not penned by Allen; it was not his choice of words although he signed the bottom of the form. Nothing in the record indicates that he was verbally informed of his right to refuse or that he actually took time to read it and understand its meaning. See generally R.278; cf Thurman, 846 P.2d at 1273 (taint dissipated where defendant was given two Miranda warnings prior to consent). In the midst of all the police activity, including the unannounced entry, the Terry frisks, and the detentions of all the people at the house, it is doubtful that he did or, if so, that he felt he really had the option of asserting his rights. Consequently, as in Maez, the fact that Allen was informed in writing of his right to refuse does not in and of itself render his consent voluntary. See 872 F.2d at 1456 (although consentor was informed that she could refuse, she testified that police said they would get a warrant if she did not consent).

The Utah Supreme Court in Shoulderblade, in dictum, postulated that "the independent discovery of additional inculpatory evidence giving the police probable cause to arrest an individual can attenuate a previous improper arrest from a subsequent

confession by the accused." 905 P.2d at 295 (citations omitted). In this case, the previous illegal entry is not attenuated from Allen's consent by Brimley's intervening discovery of the paraphernalia in plain view in the living room. As noted supra Point I.C.i., that discovery is tainted by the illegal entry as well; an officer must be lawfully present in order for evidence to be admissible under the plain view doctrine. See Gallegos, 967 P.2d at 976. As such, the evidence was not "independent[]ly" discovered by the police. Shoulderblade, 905 P.2d at 295. Indeed, the evidence was only discovered because the police were illegally inside the house. This does not constitute the hypothetical attenuation contemplated by Shoulderblade. See id.

Lastly, there is no temporal proximity that purges the taint of the illegal entry on Allen's consent. "A brief time lapse between a Fourth Amendment violation and consent often indicates exploitation because the effects of the misconduct have not had time to dissipate." Shoulderblade, 905 P.2d at 293 (citation omitted). Here there was very little time between the illegal entry and Allen's consent. As a matter of fact, the events seemed to happen contemporaneously: Brimley entered the house, he saw the paraphernalia in the living room, he saw the men sitting at the table in the kitchen, he asked the men to step out of the kitchen, the men were detained, frisked, and asked for their identification, then taken outside where Brimley asked Allen for consent to search the house. R.278[28-32,35]. The State did not present any evidence that Allen had time between the illegal entry and his consent to consider his situation in a "calmer setting, far removed

from the [earlier] events." Thurman, 846 P.2d at 1273 (taint dissipated where five hours passed between illegal entry and defendant's consent). "On these facts, it is apparent that [Brimley] exploited the [illegal entry] to gain permission to search" the house. Shoulderblade, 905 P.2d at 294 (consent tainted where officer asked defendant's permission to search car right after stopping car at illegal road block); see also Hansen, 2002 UT 125 at ¶69 (taint did not dissipate where "negligible" time lapsed between illegal detention and officer's request to search defendant's car).

Given that Allen's consent is neither voluntary nor attenuated from the illegal entry, it cannot serve as a constitutional basis for justifying a search of the house, either as to the living room where the paraphernalia was found or Earl's backpack, which sat on the floor in the living room by the couch. See Maez, 872 F.2d at 1454-55.

b. Allen's Consent to Search Was Limited to His Property Alone and the Officers Did Not Have a Reasonable Belief That Earl's Backpack Belonged to Allen or That Allen Had Common Authority over it to Validate His Consent to Search it.

Assuming for the sake of argument only that Allen's consent was proper under the Fourth Amendment, it still does not justify the search of Earl's backpack since the consent was limited by the terms of the written consent itself to "property that is under [Allen's] care, custody, or control." R.69 (Allen's Written Consent Form).

Brimley admitted at the suppression hearing that Allen's consent was limited to property under his control. R.278[42]. Nonetheless, he testified that he searched the backpack belonging to Earl. According to Brimley, Allen did not inform him that it

belonged to Earl until after it was searched. R.278[36,42-43]. In the backpack Brimley located two iodine bottles, scales, an instruction book on how to cook meth, red phosphorous and court documents linked to Earl. R.278[36].

Like Gledhill, Allen had neither the actual or apparent authority to consent to a search of the backpack. See Matlock, 415 U.S. at 171-72; Rodriguez, 497 U.S. at 188. First, Allen did not have actual authority because he did not own the backpack or have any right of access to it to justify his consent. Indeed, Brimley testified that Allen informed him that the backpack did not belong to him. R.278[36,42-43]. The State did not present any evidence that the backpack belonged to Allen or was shared by him. See generally R.278.

A review of Frazier v. Cupp, 394 U.S. 731 (1969), illustrates well that authority to consent derives only from a person's ownership or right of access to a bag. In Frazier, the police searched a duffel bag belonging to the defendant and his cousin, Rawls. Id. at 740. Rawls pointed the police to the bag and consented to its search. Id. The police found some inculpatory clothing belonging to defendant. Id. The Court stated, "[s]ince Rawls was a joint user of the bag, he clearly had authority to consent to its search." Id. "Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside." Id. Hence, the search was upheld. Id.

This Court in State v. Harrison, 805 P.2d 769 (Utah Ct. App. 1991), adopted

Frazier's reasoning in holding that defendant's wife had common authority over a diaper bag and, therefore, actual authority to consent to its search, which uncovered a gun that linked defendant to a homicide. Id. at 783 (citing Frazier, 394 U.S. at 740). "It is quite clear that either party sharing joint use of property can, under the [F]ourth [A]mendment, give valid consent to a search of that property." Id.

Contrary to the defendants in Frazier or Harrison, none of the State's evidence establishes that Allen shared the backpack with Earl, or that he otherwise had access to it. See generally R.278. Rather, the backpack belonged to Earl alone and was accessed by only him. Id. Consequently, unlike Frazier and Harrison, Allen lacked the common authority over the backpack to validate his consent to search. See Frazier, 394 U.S. at 740; Harrison, 805 P.2d at 783.

Allen similarly lacked apparent authority to consent to a search of Earl's backpack. Brimley admitted that he understood Allen's consent applied only to items belonging to him. R.278[42]. The consent form itself expressly states that Allen gave consent only as to "property that is in my care, custody, and control. . . . I understand that I may only give permission to search property that is under my care, custody or control." R.69. Although Brimley testified that Allen did not inform him that the backpack belonged to Earl until after the search was complete, he did not expressly state that he believed the backpack belonged to Allen during the search itself. R.278[25-47].

Assuming that Brimley had a mistaken belief that the backpack belonged to Allen

and therefore fell within the sweep of his consent, this fact in and of itself does not justify the search because the other factors surrounding it were ambiguous and should have alerted Brimley to the necessity of inquiring further about the true owner of the backpack. See Rodriguez, 497 U.S. at 188. Illinois v. James, 645 N.E.2d 195 (Ill. 1994), is instructive on this point. In that case, the defendant was a passenger in a car that was stopped by the police. Id. at 197. The police directed the driver and passengers to step out of the car. Id. When the defendant exited, she left her purse in the front passenger seat. Id. An officer escorted her away from the car. Id. While defendant was unaware, the driver agreed to a search of the car. Id. at 198. The officers opened the purse and found drug paraphernalia. Id.

The Illinois Supreme Court held that the officers did not have a reasonable belief in the driver's authority to consent to the search of defendant's purse. Id. at 203. First, the Court noted that a third party's consent to search "does not extend to an item . . . that belongs exclusively" to another person. Id. (citing United States v. Welch, 4 F.3d 761 (9th Cir. 1993)) (passenger's consent of car search did not permit search of companion's purse) (other citations omitted).

The Court went on to note the particular facts of the case undercutting the reasonableness of the officer's belief in the driver's authority to consent.

> [I]t would have been objectively reasonable for the law enforcement officer to realize that the purse might belong to one of the passengers rather than to [the driver]. A purse is normally carried by a woman, and all of the adult occupants of the vehicle were women. Thus, the purse could logically have

> belonged to any one of the three adult women in the car. The purse was found on a passenger seat in the car, not on the driver's seat, thereby tending to the conclusion that the purse belonged to the passenger, not the driver. It would have been unreasonable for the officer to believe that [the driver] shared some common use in the purse with one of the passengers . . . since a purse is generally not an object for which two or more persons share common use and authority.

Id. at 203. The Court further reasoned that the defendant was unaware that the driver gave consent to search the car, and that she did not know the police intended to search the car when they asked her to exit it. Id. "Under these circumstances, the defendant did not abandon her purse in the vehicle, nor did she assume the risk that someone might look into her purse if she left it in the car." Id.

As in James, Brimley's belief in Allen's authority to consent to the search of the backpack is undermined by a host of factors that should have alerted him to the necessity of determining its owner prior to searching it. First, Brimley was aware that Allen was not the only person in the house. R.278[28]. Brimley's own testimony established that there were four men present who may have owned the backpack. Id.

Additionally, a backpack is the male equivalent of the woman's purse at issue in James to the extent that it is likely to be used exclusively by a man and not jointly among many. See 645 N.E.2d at 203. The necessity of determining the backpack's owner was even more pressing considering that it was sitting in the living room. a common area where anyone could have left it, as opposed to an area of the house where Allen alone had access (i.e. - a bedroom). R.278[22].

Finally, as in James, none of the State's evidence establishes that Earl was aware that the search was going on or that Allen consented to it in the first place. See 645 N.E.2d at 203. As Brimley testified, the men were outside the house when he approached Allen to ask for consent to search. R.278[35]. Brimley did not state that Earl was privy to the conversation with Allen or otherwise made aware of the consent to search. See generally R.278. The record also lacks any evidence that Brimley informed any of the other men, including Earl, that they had a right to refuse consent to search their belongings. See United States v. Poole, 307 F.Supp. 1185, 1190 (D. La. 1969) (officer did not have reasonable belief in third party authority to consent where other people were present in apartment who could have owned searched bag; "simple expedient of informing [all present] that [they] had right to object to search" would have avoided illegal search). Consequently, Earl did not have the opportunity to protest the search of his backpack. See United States v. Langston, 970 F.2d 692, 698 (10th Cir. 1992) (officer had reasonable belief in third party's authority to consent where defendant remained silent while aware of consent and assisted in search).

Yet, despite all the ambiguity of the circumstances surrounding the ownership of the backpack, Brimley failed to further inquire into it's ownership. See Rodriguez, 497 U.S. at 188. Failure to do so does not meet the reasonableness standard of the Fourth Amendment. Id.

iii. The Evidence Is Not Admissible Pursuant to a Search Incident to Earl's Arrest since it Is Tainted by the Initial Unlawful Entry and Is Unreasonable under the Totality of the Circumstances.

The trial court entered findings of fact indicating that the men in the house were asked for identification. R.129. "The Defendant indicated he had no proper identification, and stated his name was 'Justin Ganon.'" R.129. During a patdown of Earl, Brimley located his wallet. R.129 Earl granted Brimley permission to remove the wallet and look inside. Id. The wallet contained Earl's identification with the name Joshua John Earl on it. Id. Earl was taken into custody for presenting false identification to a police officer. Id.; see also Utah Code Ann. § 76-8-507 (1999) (criminalizing act of providing false identification to peace officer); Utah Code Ann. § 77-7-2 (1999) (authorizing officer to arrest person who commits offense in his presence). The court made the following legal conclusions: Earl's arrest was lawful. R.131. His backpack was within his immediate control, and its search was contemporaneous with his arrest. R.131-32. Hence, the evidence is admissible as a search incident to an arrest. R.132.

The trial court's findings and legal conclusions do not explain the legal basis for its holding that a search incident to a lawful arrest, occurring as a result of the initial illegal entry, justifies the admission of the evidence found on the coffee table and in Earl's backpack. See generally R.127-32. In fact, there is no such legal justification.

Utah law allows a defendant to be *arrested* pursuant to an illegal entry if he commits an "intervening illegal act." State v. Griego, 933 P.2d 1003, 1008 (Utah Ct.

App. 1997). The rationale underlying this rule is to deny defendants "carte blanch to commit further criminal acts" at the cost of society's interest in deterring police conduct. Id.

While arrest for an intervening illegal act is sound, a warrantless search pursuant to such arrest is not. Just as society must not give "carte blanche" to criminals in this context, society must also guard against giving "carte blanche" to officers who want to search for evidence under the guise that they have made a lawful arrest on account of their illegal entry. Id.; see also Utah Code Ann. § 77-7-2 (1999) (providing for warrantless arrest, but not warrantless search). Allowing officers to search an arrestee under these circumstances, without more, undermines the deterrent value of suppression. See Hansen, 2002 UT 125 at ¶¶ 62, 65 (citations omitted). Indeed, a per se rule allowing a search incident to an arrest where the arrest was precipitated by an illegal entry gives police "blanket authority to search wherever they please[] and for whatever might pique their interest." State v. DeBooy, 2000 UT 32, ¶26, 996 P.2d 546 (Fourth Amendment drafted to protect against abusive practices under general warrants). It also gives police a disincentive to honor constitutional guarantees of privacy. See Hansen, 2000 UT 125 at ¶62 (citations omitted).

Hence, the taint of the illegal entry upon a search incident to an arrest differentiates this case from cases involving searches incident to arrest where there is no taint. As noted in Chimel v. California, 395 U.S. 752 (1969), a search incident to arrest

where there is no precipitating illegal conduct is justified so long as it is contemporaneous with the arrest and it is limited to the area within the arrestee's immediate control. Id. at 763-64. This type of search is justified on the basis of officer safety and the need to preserve evidence. Id. at 763.

Where there is prior illegal police conduct, an extra layer of analysis is required to ensure that the officers are not exploiting the illegal conduct to arrest a person and search their belongings under the pretext of a search incident to arrest. As noted in Wong Sun , where police misconduct is an issue, the Fourth Amendment requires that "the evidence . . . has [not] been come at by exploitation of that illegality." 371 U.S. at 488. Indeed, it is incumbent upon courts to ensure that evidence gained by precipitory police misconduct is not admitted against defendants so as to preserve the integrity of the judicial system. See Terry v. Ohio, 392 U.S. 1, 12 (1968) (exclusionary rule serves the "vital function" of maintaining "'judicial integrity'") (quotation omitted).

A broader inquiry than the one set forth in Chimel is thus necessary. That broader inquiry must look into the reasonableness of the search under the totality of the circumstances. See Terry, 392 U.S. at 19; State v. Schlosser, 774 P.2d 1132, 1139 (Utah 1989). As noted in Terry, the reasonableness of the officer's actions under the totality of the circumstances is particularly relevant. See Terry, 392 U.S. at 22. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to

sanction." Id. at 22 (citations omitted). "And simple 'good faith . . . is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Id. (citation omitted)

Moreover, inquires under the Fourth Amendment "'always should be conducted with the deterrent purpose of the . . . exclusionary rule sharply in focus.'" Thurman, 846 P.2d at 1263 (quoting Brown, 422 U.S. at 612 (Powell, J., concurring)). Consequently, where taint is an issue, an intervening offense after the illegal entry is not dispositive as to whether the subsequent search was permissible. An intervening act nullifies the exclusionary rule only if "excluding the evidence will [not] effectively deter future illegalities." Shoulderblade, 905 P.2d at 292. As such, intervening illegal conduct is but one factor that must be assessed in light of all other factors in Earl's case, including the taint or exploitation of the prior illegal entry.

Appellate courts have recognized these principles in determining whether a confession or a consent to a search is sufficiently attenuated from illegal police conduct such that suppression would have any deterrent effect. See supra Point I C ii. (a). In addition to considering the presence of an intervening criminal act, these courts consider the purpose and flagrancy of the police misconduct, and the temporal proximity of the misconduct to the search. See United States v. Ramirez, 91 F.3d 1297, 1303 (9th Cir. 1996), reversed on other grounds, 523 U.S. 65 (1998); Shoulderblade, 905 P.2d at 292.

In light of the foregoing and under the totality of the circumstances, the search incident to Earl's arrest was unreasonable and not sufficiently attenuated from the prior illegal entry to permit admission of the evidence. Id. First, Earl was arrested for the non-violent offense of providing false i.d. to a police officer. R.278[33]. This is not the sort of crime associated with violent weapons and which might otherwise justify a limited search in the interests of police safety. See Terry, 392 U.S. at 28 (protective frisk reasonable given defendants were suspected of "daylight robbery" that is "likely to involve the use of weapons").

Moreover, Brimley did not testify that Earl was behaving in a manner that would suggest he might pose a threat to the officers. Quite the opposite, Brimley's testimony establishes that Earl was cooperating with police and was honest about the presence of weapons. Brimley asked Earl directly whether he had weapons on him. R.278[32]. Earl admitted that he did. Id. During the subsequent frisk, Brimley recovered the knives that Earl carried - one in his pants and another in a pocket. R.278[32-33]. Brimley also testified that he did not observe any threatening gestures from any of the men, including Earl. R.278[41]; cf State v. Trane, 2002 UT 97, ¶22 n.3, 57 P.3d 1052 ("exigent circumstances existed here where Trane began to resist the officers physically and violently, thereby placing in question their safety").

If anything, Brimley's subsequent behavior betrays his intent to exploit the prior illegal entry to conduct a search and that he was not genuinely concerned about the

presence of weapons in Earl's backpack. See Hansen, 2002 UT 125 at ¶66 (officer exploited illegal detention by asking defendant if he could search car although officer did not have suspicion of further illegality). Brimley testified that he sat Earl on the couch after he recovered the knives and Earl's wallet with his i.d.. R.278[33]. Brimley testified that Earl was within eight to ten feet of the backpack at that point. R.278[37].

Despite Earl's proximity to the pack, Brimley did not search it at that point as an officer might do if he was concerned that Earl would reach into it and grab a weapon. Rather, he took the time to take all the men outside onto the front lawn, then asked Allen for consent, had Allen sign a consent form, and then searched the pack. R.278[ 35]. Brimley's procrastination in searching the pack is not consistent with an officer who is genuinely concerned about an arrestee's potential access to weapons or destruction of evidence. See Chimel, 395 U.S. at 763 (search incident to arrest justified by officer safety and preservation of evidence).

In fact, Brimley had already taken several precautions to ensure officer safety such that the additional warrantless intrusion into the backpack is unjustified. Prior to searching the pack, he removed all the men from the kitchen where knives were likely kept. R.278[31]. He frisked them all and asked them if they had weapons. R.278[32]. He detained them and ultimately removed them to the front yard. R.278[40,45]. Moreover, at least Earl was handcuffed (the record is unclear about the other men). R.278[33]. Consequently, Brimley was unreasonable in searching the backpack without

a warrant under the circumstances. If anything, Earl and the other men were so far removed from the pack by the time it was searched that any threat to officer safety or evidence was obviated. See State v. Wells, 928 P.2d 386, 389 (Utah Ct. App. 1996) (exigency dissipated where suspects were handcuffed and detained).

iv. There Were No Other Exigent Circumstances That Merited a Warrantless Search; the Officers Had Time to Obtain a Warrant as Required by the Fourth Amendment.

In addition to the foregoing, there were no other exigencies that justify the search and seizure that occurred in this case. In fact, Brimley had "'abundant opportunity [to obtain a warrant] and to proceed in an orderly way. . . .; there was no probability of material change in the situation during the time necessary to secure such warrant.'" Chapman, 365 U.S. at 614 (quotation omitted). "[W]hen a private residence is involved, the State's burden in proving probable cause and exigent circumstances is 'particularly heavy.'" State v. Yoder, 935 P.2d 534, 540 (Utah Ct. App. 1997) (quotation and citation omitted). "This elevated burden is a result of the 'heightened expectation of privacy' that citizens enjoy in their own homes." Id. (quotation and citation omitted).

First, the search "was of permanent premises, not of a movable vehicle." Chapman, 365 U.S. at 615. Consequently, there was little risk of losing the evidence. See State v. Anderson, 910 P.2d 1229, 1237 (Utah 1996) (defendant in movable car created exigency since he could drive off with evidence). Moreover, the house was in a populated urban area, as opposed to an isolated area where it would be difficult to get

backup, attain a warrant, or where an officer's safety might be unreasonably compromised by the desolation of the place. See State v. Brown, 853 P.2d 851, 854 (Utah 1992) (exigency arose considering isolation and distance from other people).

The State did not present any evidence that the men inside the house were aware that Brimley was coming with Gledhill. Hence, there was similarly no risk of destruction of evidence by suspects alerted to their own "peril." State v. Limb, 581 P.2d 142, 144 (Utah 1978) (exigent circumstance occurred where defendant was aware that police suspected him of crime, giving him motive to destroy evidence). Similarly, Brimley did not "indicate[] any belief that [the men] in or outside the home were likely to seize the contraband." State v. Wells, 928 P.2d 386, 389 (Utah Ct. App. 1996) (citation omitted). "Because 'there is almost always a partisan who might destroy or conceal evidence,' the State must show more than 'a mere possibility that evidence might be removed.'" Id. at 389-90 (quotation and citation omitted) (State failed to show that officers reasonably believed that evidence would be destroyed or concealed prior to illegal search).

In addition, there was no evidence of imminent physical danger to anyone inside the house. Gledhill did not report to Brimley that someone could be hurt. See Salt Lake City v. Davidson, 2000 UT App 12, ¶10, 994 P.2d 1283 (medical emergency justifies warrantless search); In re A.R., 937 P.2d 1037, 1042 (Utah Ct. App. 1997) (no exigency where children who were allegedly neglected were found safe on front lawn outside defendant's home prior to search).

The evidence also establishes that Brimley had ample time to obtain a warrant prior to entering the house. Unlike an officer who unwittingly happens upon a crime in progress and has to make a snap decision to investigate, Brimley was aware before he even entered the house that a meth lab could be inside. He discussed this fact with Gledhill before they entered. R.278[26]. With this knowledge, he could have taken the opportunity to call in for a telephone warrant without undue delay. See Utah Code Ann. § 77-23-204(2) (1999) (providing for telephonic search warrant where time does not permit written affidavit from officer); see also State v. Larocco, 794 P.2d 460, 470 (Utah 1990) (time it would take to secure warrant considered under exigency analysis). Gledhill testified that she had a cellular phone, so Brimley could have used her phone if he did not have one of his own. R.278[11]. The State did not present evidence that Brimley's failure to capitalize on the opportunity to get the warrant was borne out of anything more than inconvenience or a slight delay. "These are never very convincing reasons and . . . are not enough to by-pass the constitutional requirement." Chapman, 365 U.S. at 615.

Even after Brimley and Gledhill entered the house, there were no exigencies justifying further warrantless intrusion. Brimley testified that the men were behaving in a calm and non-threatening manner. R.278[41]. They did not appear agitated or distressed despite their awareness of the police presence. See Brown, 853 P.2d at 854 (warrantless search justified given agitation and distress exhibited by camp personnel

after homicide). They obeyed Brimley's orders to exit the kitchen and eventually the house. See Trane, 2002 UT 97 at ¶22 n.3 (exigency arose where defendant violently resisted arrest). Moreover, after the men were asked out of the kitchen, a second officer, Loosle, arrived to provide back-up. R.278[27]. Between Brimley and Loosle, one of the officers could have stood guard over the men and the scene while the other called in for a warrant to proceed with the search. See State v. Maycock, 947 P.2d 695, 698 (Utah Ct. App. 1997) (since only one officer was present at scene, securing warrant was not possible without risk that suspect might flee or destroy evidence).

Finally, the men were secured from the evidence and potential weapons, and a crime was not in progress. Brimley testified that the men were removed from the kitchen, frisked, detained, and then taken outside before he sought consent from Allen. R.278[35]. He did not report that they were involved in a crime when he saw them, only that they were looking at a computer. R.27[14,27]; see State v. Case, 884 P.2d 1274, 1277 n.3 (Utah Ct. App. 1994) (less exigency is involved where the crime is not going on at the time the police enter). Consequently, the concern for officer safety was obviated at least at that point. See Wells, 928 P.2d at 389 (exigencies "dissipated" once suspects were "handcuffed and in custody").

In addition, the record does not reflect that the men were close enough to the evidence in the living room to suggest a risk that evidence would be destroyed. In fact, the men were in the kitchen when Brimley first entered the house. R.278[27]. A partial

wall divided them from the room where the evidence was located, and according to Brimley's own estimate, they were approximately twenty feet from the paraphernalia. R.278[31,36]. As such, it was physically impossible for the men to reach the evidence or destroy it. Moreover, Earl was outside the house, handcuffed, when Brimley searched his backpack. R.278[33,35]. Where Brimley and Loosle "had controlled the . . . situation," there was no exigent justification for the search. Wells, 928 P.2d at 389.

"Considering the 'mosaic of evidence'" in this case, exigent circumstances did not justify Brimley's illegal entry into the house or his subsequent failure to obtain a warrant. Id. at 390 (quotation omitted).

## CONCLUSION

In light of the foregoing, Earl respectfully request this Court to reverse the trial court's denial of the suppression motion and remand for further proceedings.

RESPECTFULLY submitted this 7th day of February, 2003.

Catherine E. Lilly

CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 7th day of February, 2003.

Catherine E. Lilly

CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of February, 2003.

_____

ADDENDA

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

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| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>SENTENCE, JUDGMENT, COMMITMENT |
| vs. | : | Case No: 011919597 FS |
| JOSHUA JOHN EARL,<br>Defendant. | : | Judge: SHEILA K. MCCLEVE<br>Date: September 16, 2002 |

Custody: Salt Lake County Jail

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PRESENT
Clerk: lauraj
Prosecutor: COEBERGH, COLLEEN K
Defendant
Defendant's Attorney(s): DELLAPIANA, RALPH

DEFENDANT INFORMATION
Date of birth: September 24, 1975
Video
Tape Number: 9/16/02 Tape Count: 10:39:27

CHARGES

1. POSSESSION OF A DRUG PRECURSOR (amended) - 2nd Degree Felony
Plea: Guilty - Disposition: 07/29/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of POSSESSION OF A DRUG PRECURSOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 011919597
Date: Sep 16, 2002

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SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

COURT IMPOSED 1-15 YEARS PRISON, CREDIT FOR TIME SERVED.

Dated this ____ day of _____, 20____.

_____
SHEILA K. MCCLEVE
District Court Judge

ADDENDUM B

MARK SHURTLEFF #4666
Utah Attorney General
Colleen K. Coebergh #8052
Assistant Attorney General
348 East South Temple
Salt Lake City, UT 84111
Telephone (801)524-3080

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff,

-vs-

**JOSHUA JOHN EARL**

Defendant.

Screened by: Colleen K. Coebergh
Assigned to: Colleen K. Coebergh

**ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS**

Case No. 011919597

Judge Hon. Sheila McCleve

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This matter having come before the Court on the 3rd day of April, 2002, on the Defendant's Motion to Suppress, the State of Utah, appearing by and through its prosecutor, Colleen K. Coebergh, Defendant appearing personally and by and through his counsel, Ralph Dellapiana of the Salt Lake Legal Defenders Association; the Court having heard and considered testimony of witnesses Sheila Gledhill, Dean Brimley, and Scott Daniels, and having received

and considered Defendant's Motion, the State's Response thereto, and the Defendant's Reply, and being fully advised in the premises DENIED Defendant's Motion at hearing April 15th, 2002, for grounds and reasons outlined herein.

## FINDINGS OF FACT

(1) Property owner Sheila Gledhill requested assistance of the police to enter into her property at 34 West 2700 South, an address within South Salt Lake City.

(2) Ms. Gledhill reported her belief that drug activity was occurring at the residence, and stated her intention to enter to evict her son, Jeremy Allen, but was afraid of other individuals who might be within the apartment, and requested the police go along to ensure her safety.

(3) Jeremy Allen was the only person whom Sheila Gledhill had authorized to live at the address.

(4) The Officer followed Sheila Gledhill as she entered the front room after opening the locked front door with her key.

(5) From the landing just inside the front door, the Officer could see four males.

(6) At least three of the males were in a kitchen area, presumably where they could have access to knives or other sharp objects.

(7) Also from the landing area, in an adjacent living room area could be seen drug paraphernalia as well as boxes of pseudoephedrine-based medicine, bottles later determined to be iodine, a red substance visually consistent with red phosphorus.

(8) Defendant Joshua John Allen was the male sitting closest to the doorway to the livingroom, and as such was closest, within eight to ten feet, to a backpack sitting in the area of the couch.

(9) Substantially contemporaneously with another Officer's arrival, Officer Dean Brimley summoned the four males toward him for the purpose of identifying them, and removing them from the kitchen for officer safety reasons.

(10) The males were asked for identification.

(11) The Defendant indicated he had no proper identification, and stated his name was "Justin Ganon."

(12) During the pat down of Defendant, a long knife was found concealed under his clothing in the small of his back.

(13) Another knife was found in his front pants pocket.

(14) The Officer felt what he believed to be a wallet in Defendant's pocket.

(15) The Defendant was asked for, and granted permission for Officers to remove the wallet.

(16) Inside the wallet was identification indicating Defendant's true identity was that of Joshua John Earl.

(17) Defendant was taken into custody for false information.

(18) Officers were able to ascertain a backpack near or on the couch was Defendant's.

(19) Evidence was found in the backpack pertinent to the clandestine laboratory offense charged as well as documents suggesting the pack indeed belonged to Defendant.

(20) Jeremy Allen signed a written "consent to search" form authorizing the Officer to search 34 West 2700 South.

(21) The Court finds that Sheila Gledhill granted consent to search the residence.

(22) Though the Defendant took the stand on April 3rd, 2002, and asserted that he had been living at or staying at the residence overnight, the Court finds that testimony was not credible, and discounts it entirely.

## CONCLUSIONS OF LAW

(1) Though the initial entry by Officer Brimley was "warrantless," he accompanied

the landowner at her request. Therefore, the Court finds that because the landowner had a right to enter the property to inspect it, she could confer upon the Officer, her invitee, the right to enter with her.

(2) In other words, entry was with consent given by a person authorized to give consent.

(3) Further, Officer Brimley was justified in believing Ms. Gledhill had authority to grant consent to enter the residence, going with her as he did for her inspection of the property, and in furtherance of her request to "keep the peace" or protect her from unknown dangers during the eviction notice.

(4) Officer Brimley took reasonable steps to ensure that his entry with the owner was lawful by interviewing Ms. Gledhill before the entry to ascertain her ownership, relationship to the property and the occupants.

(5) Ms. Gledhill specifically granted consent to the entry and search conducted by the Officers.

(6) Once inside, from the lawful vantage point Officer Brimley occupied, the items he observed in plain view are admissible pursuant to that doctrine.

(7) Further, the court specifically finds Mr. Jeremy Allen voluntarily granted consent to search the residence, and as the renter and occupant of the property, he had authority to grant consent to search the residence.

(8) Joshua John Allen was not a resident, and his consent to search the residence was

not required.

(9) Further, even if Joshua John Allen was a resident, the search of the residence was of common areas, for which Jeremy Allen was empowered to, and did grant consent.

(10) The pat down of the person of Defendant which yielded two knives was lawful as a "Terry frisk," the court being satisfied that such was justified under the circumstances to ensure the Officer's safety because there were four male suspects and initially one, then two Officers; the proximity of the male suspects to possible weapons; and the Defendant's offering of what the Officer suspected was a false identity, heightening the Officer's concern.

(11) The Defendant voluntarily consented to removal of his wallet. Therefore, evidence of his true identity found therein is admissible.

(12) The Officer was empowered to arrest Defendant for false personal information pursuant to §77-7-2(1) U.C.A., 1999, which allows arrest of suspects who commit crimes in the presence of the Officer. Therefore the arrest of Defendant was lawful.

(13) The Court concludes the backpack was within the area of Defendant's immediate control considering Defendant's physical proximity to the backpack, the position of the Officer and the Defendant in relation to the area of the backpack, and the number of Officers (one) verses the number of suspects (four).

(14) The search of the backpack was contemporaneous with Defendant's lawful arrest.

(15) As such, search of Defendant's backpack was lawful incident to his arrest, and evidence seized pursuant to that search admissible.

(16) Finally, because the Court finds no illegal search occurred, Defendant's Motion to Suppress Defendant's Statements based on alleged violations of the Fourth Amendment is Denied.

(17) The Court finds it unnecessary to make any finding regarding whether Ms. Gledhill's actions were in violation of State Statutes on Forcible Entry and Detainer (§78-36-1 U.C.A., et. seq.) concluding that even if such violation occurred, the Statute does not provide a suppression remedy in this criminal context, but rather a civil remedy for those aggrieved.

Accordingly, the Defendant's Motion to Suppress is Denied.

Dated this 16 day of May, 2002.

Honorable Sheila K. McCleve
Judge, Third Judicial District Court

cc:

Colleen K. Coebergh
Attorney for the State
348 East South Temple
Salt Lake City, UT 84111



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Ralph Dellapiana
Salt Lake Legal Defenders for Defendant
424 East 500 South, Suite 300
Salt Lake City, UT 84111

ADDENDUM C

SOUTH SALT LAKE POLICE DEPARTMENT
CONSENT TO SEARCH

Case No: 01-06536

Name: JEREMY T ALLEN Date of Birth: 11-6-73 Phone Number: 582-5019

Address: 43W 2700So City: So SLC State: UT Zip Code: 84115

I have been requested by Officer [illegible] Badge No. [illegible]
(who has made proper identification as an authorized law enforcement officer) to give my consent to a search of property that is in my care, custody, and control.

I knowingly and willingly give Officers of the South Salt Lake Police Department and any other assisting agencies my permission to conduct a complete and thorough search of the premise(s) and/or property specifically described below. I understand that I may only give permission to search property that is under my care, custody, or control.

Location(s) to be searched:

On the premise(s) of: 43 W 2700 So. Initial [JA]

Number on door 54 W Initial [ ]

_____ Initial [ ]

In the vehicle(s) described as: _____ Initial [ ]

_____ Initial [ ]

_____ Initial [ ]

I understand this search extends to any and all items located in the above described areas, including but not limited to any opened, closed, and/or locked containers, trunks, hoods, compartments, or rooms. I further give officers permission to seize any property or things necessary for any criminal prosecution in this case or any other case under investigation. I have read and initialed the above described areas to be searched and I give permission for it to be searched voluntarily without any threat, coercion, or unlawful influence of any kind having been made to induce me to give my consent.

I UNDERSTAND THAT I HAVE A CONSTITUTIONAL RIGHT TO REFUSE THIS SEARCH.

Signature [signature] Date 11-4-01

Witness [signature] Date 11-4-01

Witness _____ Date _____

STATE'S EXHIBIT 2

HCAD-Bayonne, N. J.